

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

P.L.-1
CARTER

18494

FILE: B-200175

DATE: June 16, 1981

MATTER OF: A.R.E. Manufacturing Co., Inc.

DIGEST:

1. Protests against reconsideration of certificate of competency by Small Business Administration, which led to revocation of certificate, and procedure followed which allegedly denied protester due process under fifth amendment to Constitution, are untimely where not filed within time limits prescribed in GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980).
2. Regulation governing nondisclosure of information obtained in preaward survey must be read together with provisions implementing Freedom of Information Act, 5 U.S.C. § 552 (1976). GAO will not question agency's disclosure of nonfinancial information for which protester has neither established nor even argued confidentiality.
3. GAO may properly consider documents not released to protester in deciding protest. Protester's only remedy to obtain documents for which agency has denied disclosure is by suit in United States District Court under Freedom of Information Act.
4. Determination of price reasonableness, based partially on historical cost, was not arbitrary where there was doubt about nonresponsible offeror's ability to perform at lower price. Absent exceptions not present here, GAO will not consider challenge to affirmative determination of awardee's responsibility.

[Protest of Army Contract Award]

017277

A.R.E. Manufacturing Co., Inc. (A.R.E.), has filed a protest with our Office against the award of a contract to Keco Industries, Inc. (Keco), by the United States Army Mobility Equipment Research and Development Command (MERADCOM). A.R.E.'s protest is denied in part and dismissed in part.

A.R.E., a small business, was the low offeror responding to a solicitation for the purchase of air-conditioning units; Keco was the second low offeror. The contracting officer initially determined A.R.E. to be nonresponsible and referred the matter to the Small Business Administration (SBA) for a certificate of competency (COC) under the applicable provisions of the Small Business Act, 15 U.S.C. § 637(b)(7) (1976 and Supp. I (1977)), which gives the SBA the authority to conclusively determine the responsibility of a small business.

The SBA issued a COC on June 3, 1980, but then reopened the matter as the result of the receipt of new information which the SBA had not previously considered. A.R.E. met with MERADCOM contracting officials on July 22, 1980, and objected to the reopening of its COC. MERADCOM officials rejected A.R.E.'s contentions in this meeting. On July 30, 1980, the SBA reversed its earlier decision and decided not to issue a COC. A.R.E. was in contact with the SBA throughout August concerning this matter. MERADCOM awarded the contract to Keco on August 20, 1980, and debriefed A.R.E. 6 days later. On August 29, 1980, A.R.E. filed its protest with our Office (1) challenging SBA's reopening of its consideration of A.R.E.'s COC and (2) questioning the award of the contract to Keco. We will discuss these major contentions and related arguments in that order.

A.R.E. expressed several objections to SBA's reconsideration of its COC. Most fundamental among these are the allied contentions that neither the SBA nor the contracting officer had the legal authority to seek reconsideration of the SBA's original grant of a COC and that the procedures followed in the reconsideration of A.R.E.'s COC and the subsequent denial

of this contract to A.R.E. violated A.R.E.'s rights under the fifth amendment of the Constitution, citing Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980), in support of this latter proposition. Both of these bases of protest were or should have been readily apparent to A.R.E. not later than August 4 when A.R.E. received the SBA's July 30 denial of its COC.

Our Bid Protest Procedures require that protests other than against improprieties apparent in a solicitation be filed with our Office within 10 working days of the date on which the basis for protest is or should have been known, 4 C.F.R. § 20.2(b)(1) (1980), or within 10 working days of actual or constructive notice of initial adverse agency action on a protest first presented to the agency, 4 C.F.R. § 20.2(a) (1980). If we consider A.R.E.'s statements at its meeting on July 22 with MERADCOM officials to be the lodging of a protest with the agency, the officials' rejections of A.R.E.'s arguments in that same meeting were initial adverse agency action on A.R.E.'s protest. Alternatively, if we do not view A.R.E.'s remarks as a protest to the agency, then we must conclude that A.R.E. was aware of these bases of protest on August 4 when it received the SBA's letter of July 30 advising A.R.E. of the denial of its COC. A.R.E.'s August 29, 1980, protest on these bases is untimely under either view. Consequently, we will not consider these questions on the merits. We do note parenthetically, however, that unlike the situation in Old Dominion Dairy Products, Inc. v. Secretary of Defense, supra, A.R.E.'s own submissions establish that A.R.E. was substantially apprised of the allegations against it being considered by the SBA and afforded an opportunity to respond before SBA formally revoked its COC on July 30.

A.R.E. also suggests that the revocation of its COC was improper because SBA mistakenly relied on erroneous allegations furnished to it by MERADCOM. A.R.E. obtained the information on which this claim is based on September 9, 1980. A.R.E. did not raise this question in writing until it submitted its post-conference comments to our Office on December 29, 1980. This objection is also untimely. 4 C.F.R. § 20.2(b)(1) (1980).

A.R.E. also contends that the reconsideration and subsequent denial of its COC is tainted because it originated in part with the unauthorized disclosure to Keco of information obtained during the course of the preaward survey of A.R.E. In this connection, it appears that in response to Keco's expressed reservations about A.R.E.'s ability to obtain certain critical long leadtime compressors in sufficient time to meet MERADCOM's delivery requirements, MERADCOM officials advised Keco that A.R.E. had displayed a quantity of the compressors to the preaward survey officials. This disclosure stimulated an investigation into and the eventual challenge by Keco to the SBA's grant of A.R.E.'s COC which led to the reconsideration and denial. A.R.E. contends that MERADCOM's disclosure of this information violated the provisions of Defense Acquisition Regulation (DAR) § 1-907 (1976 ed.), which generally prohibits the release outside of the Government of information obtained in a preaward survey.

We do not agree with A.R.E. Initially, we note that DAR § 1-907 does not by itself prohibit the release of any and all information obtained in a preaward survey, but must be read together with DAR § 1-329, the DAR's Freedom of Information Act (FOIA) provision. A reasonable reading of these two provisions is that, although they might exempt a preaward survey from release under the FOIA, they do not prohibit the release of information in a survey which is not otherwise protected or confidential. A.R.E. has provided neither evidence nor argument to the effect that the fact of A.R.E.'s mere possession of these compressors was either confidential or protected. Therefore, we find no basis here to question MERADCOM's actions.

A.R.E. also argued that it was inappropriate for us to proceed with this matter until A.R.E. has been furnished copies of certain exhibits to the agency report which were provided to this Office but not to A.R.E. We have, however, consistently held that we may properly consider documents not furnished to a protester in deciding a bid protest and that the protester's sole remedy to obtain undisclosed documents

from the agency is by FOIA suit in a United States District Court. See generally Systems Research Laboratories, Inc. - Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341, and cases cited therein. Consequently, we find this argument to be without merit.

A.R.E. contests the award of the contract to Keco on two independent bases: (1) A.R.E. contends that Keco's price is unreasonable, and (2) A.R.E. argues that Keco will not be able to meet MERADCOM's delivery schedule. We find no merit in either assertion.

A.R.E.'s first contention is based in part on the difference between its own and Keco's prices. While we recognize that there was in fact a sizeable price difference, the record reflects substantial concern on the part of procuring officials concerning A.R.E.'s ability to deliver at its lower price. The record also indicates that MERADCOM relied partially on the history of similar procurements in determining Keco's price to be reasonable. In these circumstances, A.R.E. has not persuaded us that this determination of price reasonableness was not rationally based. See Kramer Associates, Inc., B-197178, July 16, 1980, 80-2 CPD 33.

A.R.E.'s second objection is directed to MERADCOM's affirmative determination of Keco's responsibility. Absent certain exceptions not relevant here, we no longer review protests against affirmative determination of responsibility. Emerald Maintenance, Inc., B-201208, December 30, 1980, 80-2 CPD 451; Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. This assertion is dismissed.

Milton J. Aorolan

Acting Comptroller General
of the United States